

ORIGINAL

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VIA HAND DELIVERY

January 4, 2001

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JAN - 4 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

EX PARTE

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

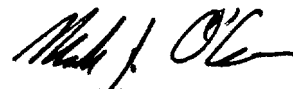
EX PARTE OR LATE FILED

Re: Written *Ex Parte* Presentation
CC Docket No. 98-183

Dear Ms. Salas:

Attached please find two copies of a letter written on behalf of EarthLink, which was delivered to the FCC's Common Carrier Bureau on January 3, 2001. Please include the attached letter in the public record in the above-captioned proceeding. Should you have any questions, please feel free to contact me.

Sincerely,



Mark J. O'Connor

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Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation -- CC Docket 98-183

Dear Ms. Attwood:

EarthLink, Inc. ("EarthLink"), by its counsel, files this letter to emphasize the importance of the Commission's pending consideration of the above-referenced docket. EarthLink urges the FCC to reiterate that consumer choice and competition require that all Internet service providers ("ISPs") have reasonable and nondiscriminatory access to the wireline telecommunications services of facilities-based carriers.

To its credit, the Commission has been cognizant for decades of the substantial public interest benefits of ensuring that all facilities-based wireline carriers offer their underlying telecommunications services in a nondiscriminatory and reasonable manner to competing information service providers. This fundamental principle has stimulated the rich array of services consumers today enjoy. Now, especially as advanced telecommunications services, such as Digital Subscriber Line ("DSL"), are increasingly offered by both incumbent local exchange carriers ("LECs") and their new affiliates, it is even more important for the FCC to ensure that ISPs have access to these unbundled services, regardless of carrier affiliation. Not only will this key step continue the growth, vitality and diversity of ISP services, it will foster market-driven consumer choice and vigorous competition in the broadband arena.

This unbundling requirement, articulated many times and set forth most cogently in the FCC's Computer II precedent, establishes a clear obligation for the wireline telecommunications industry: facilities-based carriers that also offer information services must "acquire transmission capacity pursuant to the same prices, terms, and conditions ... when their own facilities are used."¹ The Commission recognized that this bedrock tenet should apply broadly for all wireline

¹ *Amendment of Section 64.702 of the Commission's Rules and Regulations. Final Decision*, 77 FCC 2d 384, 475 (1980) ("Computer II").

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January 3, 2001

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carriers because "a basic service is the building block upon which enhanced services are offered."²

Significantly, the FCC has long held that this obligation is grounded in the fundamental common carriage framework of Title II of the Communications Act.³ Pursuant to Sections 201 and 202 of the Communications Act, an inherent obligation of a common carrier is to offer telecommunications services to all users – whether affiliates and non-affiliates – without unjust and unreasonable discrimination.⁴ A carrier's refusal to offer an unbundled telecommunications service to unaffiliated ISPs, while granting its affiliated ISPs access to these services, is *per se* a violation of these basic statutory obligations. DSL and other telecommunications services, un-enhanced by "bells and whistles" that ISPs may not need or want, remain the vital building blocks that allow all information service providers to offer their products. Carrier failure to make them available is an unjust and unreasonable practice.

Legal precedent for this guiding principle is strong. As competition has evolved, the FCC has reiterated the need for access to wireline telecommunications services, beginning in the 1950s with the "Hush-a-Phone" decision and continuing to the present.⁵ Indeed, the FCC's discretion to delineate practices that are unjust and unreasonable as proscribed by Sections 201(b) and 202(a) has been repeatedly affirmed, allowing the Commission to ensure that carriers do not undermine competition and that service requirements reflect market conditions.⁶ In today's market, access for ISPs to wireline telecommunications service inputs, including DSL, is no less critical than it has ever been – and may be more so. While EarthLink does not address here the FCC's policies and pronouncements in other contexts, such as regarding wireless applications and markets, the record is clear that an integral component of attaining the public interest and the mandates of the Communications Act in the wireline context is to reaffirm that

² *Id.*

³ Computer II, 77 FCC 2d at 387 (Under Computer II, the "common carrier offering of basic transmission services are communications services and regulated as such under traditional Title II concepts"); *Independent Data Communications Manufacturers Association*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, 13719 (¶ 13) (CCB 1995) ("Section 202 of the Act also prohibits a carrier from discriminating unreasonably in its provision of basic services.") ("IDCMA"); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 n. 72 (1995) (same).

⁴ 47 U.S.C. §§ 201(b), 202(a).

⁵ Hush-a-Phone Corp. v. U.S., 238 F.2d 266 (D.C. Cir. 1956); IDCMA, 10 FCC Rcd. at 13724 (frame relay service must be unbundled from enhanced service, and offered on a tariffed basis).

⁶ Cellnet Communications, Inc. v. FCC, 149 F.3d 429, 437 (6th Cir. 1998).

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facilities-based carriers must unbundle their telecommunications services at nondiscriminatory rates, terms and conditions.

In accordance with the Commission's ex parte rules, two copies of this letter will be filed with the Commission's Secretary's office. Should you have any questions regarding this letter, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark J. O'Connor", is positioned above the typed name.

Donna N. Lampert
Mark J. O'Connor
Counsel for EarthLink, Inc.

cc: Glenn Reynolds
Michelle Carey
Jodie Donovan-May

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